ARBITRATION AWARD

Panellist:	*P. NAUDE*
Case No:	*PSHS515-10/11*
Date of Award:	*24 July 2011*

*In the **ARBITRATION** between*

DENOSA OBO JACOBS F.B.

Applicant

And

DEPARTMENT OF HEALTH: EC

Respondent

Union / Applicant Representat	*MR SCHEEPERS*
Union / Applicant's address	*PO Box 469* *Port Elizabeth* *6000*
Telephone No.	*0414847323*
Facsimile No	*0414842703*
Union / Respondent Represen	*MR MAY*
Union / Applicant's address	*Po Box 1154* *Humansdorp* *6300*
Telephone No.	*0422004214*
Facsimile No.	*0422911073*

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DETAILS OF HEARING AND REPRESENTATION:

The applicant Miss Jacobs is represented by her union, Denosa. Mr Scheepers appears for her. The respondent is represented by Mr May an official of the respondent.

The certificate that has been issued categorises the dispute as being one which relates to section 186 (2) (a), unfair conduct on the part of respondent relating to promotion. The respondent at the outset indicated that the applicant had failed to file a grievance within the required 90 day period and as a result there has been non compliance with resolution 14 of 2002 which deals with grievances.

ISSUE TO BE DECIDED:

Broadly stated the issue that needs to be determined is whether or not the applicant is prevented from proceeding with this arbitration because she failed to timeously refer the dispute in terms of the resolution.

SURVEY OF EVIDENCE AND ARGUMENT:

The facts detailed below appear to be common cause and are thus not in dispute. The applicant was employed as a nurse with a local municipality. The respondent after following the usual processes to appoint someone in a vacant position on the fixed establishment resorted to a process known as head hunting. The applicant was the person head hunted and appointed to the post in August 2008.

The applicant was furnished with a letter of appointment dated 4th August 2011 which inter alia stipulated that:

- She had been appointed as a professional nurse;
- That her place of work would be the Kirkwood Clinic; and
- That her salary would be R177 318.00 per annum.

It is common cause that this offer was accepted by the applicant. The applicant resigned from her employment with the municipality and took up her employment with the respondent. Shortly after commencing her employment she was approached by an official with a second 'offer' letter in which the remuneration packaged is reflected as being R124 365.00.

The official indicated that if she did not accept this 'new' offer she would be without a job. It would seem that her previous position with the municipality was no longer available and that this development placed her in a precarious position so she accepted the 'revised' offer.

The applicant accepted the 'first' offer on or about the 29th August 2008. The second offer is dated 26th September 2008 (although the letter is signed as been dated the 29th August 2008). Clearly the first mentioned date must be the correct one. It would appear that some time during September 2008 the respondent realised, or, concluded that it had appointed the applicant on the incorrect notch or salary scale. The second offer thus sought to rectify that position.

After the 'acceptance' of the revised or second offer, the applicant's remuneration was duly adjusted to the lower notch. During or about May 2010 the applicant went to her union and complained about the situation. A grievance was filed on or about the 10th May 2010. The grievance form states that the applicant became aware of the dispute on or about the 05th September 2008.

The dispute finally found its way to the council. The matter was scheduled for conciliation but due to a double booking of the conciliating commissioner the dispute was not conciliated by her. The commissioner concerned then issued a certificate.

ANALYSIS OF EVIDENCE AND ARGUMENT:

Before I proceed to determine the matter it is important for the parties to understand that I draw no conclusions relating to the issue of the validity of the acceptance of the first and second offers or the effect of the one on the other. Having said that it is trite law that arbitrating commissioners' must be satisfied that they have jurisdiction to arbitrate a dispute referred to the council[1]. This position is all the more so where the matter has not been conciliated and a certificate merely issued as was the case in this matter.

When categorising this dispute it would appear that an aspect of this dispute that was not recognised, or, identified by the parties was that the true nature of the dispute has, in my view, nothing to do with a dispute concerning a promotion. Before being head hunted and appointed the applicant worked for a separate legal entity in the form of a municipality. The law draws a distinction between an appointment and a promotion.

The essence of the distinction between a promotion and appointment is that in order for the act to amount to a promotion there must be an existing employment relationship between parties and there must be some advancement, elevation in rank or rise in status. What it means, simply stated, is that the filling of post by new recruit amounts to an appointment, whereas the filling of post by public service employee amounts to a promotion if the filling of a post is accompanied by advancement or elevation in status[2].

On the facts of this case the absence of an existing relationship leads me to conclude that this is not a promotion dispute as contended, as the applicant was appointed within the meaning of the judgements referred to. Although not argued I do not believe that a reduction in salary alone constitutes as demotion.

Even if I were to be wrong in my conclusion above, the dispute in my view in substance concerns a contractual dispute. It is trite that the council does not have jurisdiction to determine disputes concerning contractual matters as the position is regulated by the Basic Conditions of Employment Act[3].

Section 77 (3) of the BCEA states that:

> The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.

There are limited exceptions to this position contained in section 74 of the BCEA. It is not necessary in this case to refer to or reflect on them. In short, properly conceptualised I am of the view that this is a matter falling outside of the powers of the council and falling within those of the Labour or other Courts referred to in section 77. That being the case the council has no jurisdiction to entertain the dispute. The parties attention is drawn to section 77 (3) of the BCEA.

Given the view I take of this matter it is not necessary to determine the point raised by the respondent relating to the delay in lodging a grievance.

AWARD:

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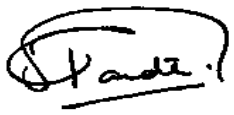
[1] *Bombardier Transportation (Pty) Ltd v Mtiya NO & others* [2010] 8 BLLR 840 (LC).

[2] See *Jele v Premier of the Province of KwaZulu-Natal & others* (2003) 24 ILJ 1392 (LC); *Department of Justice v CCMA & others* [2004] 4 BLLR 297 (LAC)

[3] Act No 75 of 1997 as amended.

Accordingly for the reasons stated above, the council lacks the necessary jurisdiction to arbitrate the dispute.



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Name: PA NAUDE - Arbitrator
(Public Health & Social Development Sectoral Bargaining Council)